

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DONALD LILLY,

Petitioner,

v.

CRIMINAL CASE NO. 02-50047
CIVIL CASE NO. 05-40239

UNITED STATES OF AMERICA,

HONORABLE PAUL V. GADOLA
U.S. DISTRICT COURT

Respondent.

_____ /

ORDER DENYING PETITIONER'S MOTION TO VACATE SENTENCE

Before the Court is Petitioner's motion under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence, filed July 25, 2005. Because Petitioner's "motion and the files and records of the case conclusively show that the prisoner is entitled to no relief," the Court will deny Petitioner's motion. 28 U.S.C. § 2255 ¶ 2.

Petitioner's sole ground for relief is that his sentence must be vacated because the Court sentenced him under a mandatory guideline regime, in violation of *United States v. Booker*, 543 U.S. 220 (2005) and *Blakely v. Washington*, 542 U.S. 296 (2004). At the outset, the Court notes that *Blakely* is not applicable to Petitioner's sentence because his sentence was imposed in accordance with the United States Sentencing Guidelines. *See Id.* at 305 n.9. As for *Booker*, Petitioner acknowledges that the Sixth Circuit has held in *Humphress v. United States*, 398 F.3d 855, 860-63 (6th Cir. 2005), that *Booker* does not apply retroactively on collateral review. Nevertheless, Petitioner asserts that the Supreme Court's denial of a writ of *certiorari* in *Rodriguez v. United States*, 125 S. Ct. 2935 (2005), renews this Court's power to decide the retroactivity issue at hand. *See Wiegand v. United States*, 380 F.3d 890, 892 (6th Cir. 2004) (district courts may decide

retroactivity issues).

Petitioner, however, is mistaken. The Supreme Court's refusal to review *United States v. Rodriguez*, 398 F.3d 1291 (11th Cir. 2005), does not overturn the settled law laid down by *Humphress*. *Humphress* is the law of this Circuit, and this Court is bound by it.

Petitioner was sentenced on March 25, 2003 and the judgment and commitment order was entered the same day. *Booker* was decided on January 12, 2005. Petitioner is attempting to apply *Booker* retroactively to attack his sentence collaterally, which is not possible.

ACCORDINGLY, IT IS HEREBY ORDERED that Petitioner's motion under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence [docket entry 20] is **DENIED**.

IT IS FURTHER ORDERED that if Petitioner desires to seek a certificate of appealability ("COA"), Petitioner may file a **MOTION** for a COA within **TWENTY-ONE (21) DAYS** of filing a Notice of Appeal and shall support this motion with an appropriate brief, both of which shall comply with the Local Rules of this Court. *See Castro v. United States*, 310 F.3d 900, 903 (6th Cir. 2002) ("We do encourage petitioners as a matter of prudence to move for a COA at their earliest opportunity so that they can exercise their right to explain their argument for issuance of a COA."). The Government may file a response with an appropriate brief, both of which shall comply with the Local Rules, within **FOURTEEN (14) DAYS** of service of Petitioner's motion for a COA.

SO ORDERED.

Dated: February 3, 2006

s/Paul V. Gadola
HONORABLE PAUL V. GADOLA
UNITED STATES DISTRICT JUDGE

Certificate of Service

I hereby certify that on February 3, 2006, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

James C. Mitchell, and I
hereby certify that I have mailed by United States Postal Service the paper to the
following non-ECF participants: Donald Lilly
_____.

s/Ruth A. Brissaud
Ruth A. Brissaud, Case Manager
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